No. 79-244

# In the Supreme Court of the United States

OCTOBER TERM, 1979

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UNITED STATES OF AMERICA, PETITIONER

*v.*

JOHN M. SALVUCCI, JR., AND JOSEPH G. ZACKULAR

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

ANDREW L. FREY
*Deputy Solicitor General*

MARK I. LEVY
*Assistant to the Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 599 F.2d 1094. The district court's memorandum and order suppressing evidence (App. 17-20) and its order denying the government's motion for reconsideration (App. 23) are unreported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 11a) was entered on June 15, 1979. On July 9, 1979, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including

August 14, 1979. The petition was filed on that date and was granted on December 10, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a defendant whose constitutional rights were not violated by an unlawful search may nevertheless obtain suppression of an item seized during the search solely because the indictment charges him, as an essential element of the offense, with unlawful possession of that item at the time of the search.

## STATEMENT

1. On May 15, 1978, respondents were charged in a federal indictment with 12 counts of unlawful possession of stolen mail, in violation of 18 U.S.C. 1708. The indictment was based on 12 checks that had been stolen from the United States mails and that were seized by Massachusetts State Police officers on December 17, 1976, during their search, pursuant to a state warrant, of an apartment rented by the mother of respondent Zackular (Pet. App. 1a-2a, 6a).[1] The indictment charged respondents with possession of the stolen mail from November 7, 1975, through Decem-

[1] The affidavit submitted in support of the application for a search warrant erroneously identified the premises as the apartment of Zackular's wife (Pet. App. 4a n.1), and this error was repeated in the court of appeals' opinion (*id.* at 2a). It was established at a pretrial hearing, however, that the apartment was rented by Zackular's mother (C.A. App. 61, 66; Tr. 45, 50).



ber 17, 1976, the date on which the search occurred (App. 4-9; Pet. App. 10a).

2. Respondents moved to suppress the checks and other evidence found during the search on the ground that the state officer's affidavit supporting the application for the search warrant was inadequate to show probable cause (C.A. App. 11-14). The district court granted those motions and ordered suppression (App. 17-20).[2] The government sought reconsideration of the district court's ruling, contending that respondents lacked standing to challenge the legality of the search and seizure (App. 21-22). By handwritten fiat on the face of the government's motion, the district court reaffirmed its suppression order (App. 23; Pet. App. 2a).

3. On the government's appeal pursuant to 18 U.S.C. 3731, the court of appeals affirmed (Pet. App. 1a-10a). With respect to the issue of "standing,"[3] the court stated (*id.* at 8a-9a):

> We agree with the Government that neither [respondent] has actual standing to contest the lawfulness of the search and seizures. Neither

[2] The district court held the officer's affidavit to be deficient in relying on double hearsay and in failing to specify both the date on which the informant had engaged in a critical conversation with respondent Zackular and the date on which the informant had conveyed the information so obtained to the officer (App. 17-18).

[3] The court of appeals also affirmed the district court's determination that the affidavit in support of the search warrant was constitutionally inadequate (Pet. App. 2a-8a). We have not presented that issue for review.

> [respondent] has established a reasonable expectation of privacy in the premises searched or the property seized, nor has either of them ever claimed a proprietary or possessory interest in the premises or the checks.

Nevertheless, the court held that respondents had standing to challenge the search and seizure under the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960). It noted that the Court in *Jones* had based the "automatic standing" rule on two considerations (Pet. App. 9a):

> (1) the unfairness of requiring the defendant to assert a proprietary or possessory interest in the premises searched or the items seized when his statements could later be used at trial to prove a crime of possession; and (2) the vice of prosecutorial self-contradiction, that is, allowing the Government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes. *Id.* [*Jones* v. *United States*] at 261-65; *Brown* v. *United States, supra*, at 229.

After acknowledging that the first consideration had been eliminated by the decision in *Simmons* v. *United States*, 390 U.S. 377, 389-394 (1968), that a defendant's testimony in support of a suppression motion cannot be used against him at trial (Pet. App. 9a), the court of appeals continued (*id.* at 9a-10a):

> The Supreme Court itself has questioned, but unfortunately not decided, whether the second prong of the *Jones* rationale, prosecutorial self-contradiction, alone justifies the continued vi-



> tality of the doctrine of automatic standing. *See Rakas* v. *Illinois, supra* [47 U.S.L.W.] at 4027 n.4; *Brown* v. *United States, supra* at 228, 229. Since the Supreme Court first questioned the vitality of this doctrine in *Brown*, there has been a split of authority as to whether the doctrine survives. *Compare United States* v. *Riquelmy*, 572 F.2d 947, 950-51 (2d Cir. 1978), *and United States* v. *Boston*, 510 F.2d 35, 37-38 (9th Cir. 1974), cert. denied, 421 U.S. 990 (1975) (doctrine survives) *with United States* v. *Delguyd*, 542 F.2d 346, 350 (6th Cir. 1976) (doctrine does not survive). Until the Supreme Court rules on this question, we are not prepared to hold that the automatic standing rule of *Jones* has been implicitly overruled by *Simmons*. That is an issue which the Supreme Court must resolve.

Finding that the indictment in this case charged as an element of the offense that respondents were in unlawful possession of the stolen mail on the date of the contested search and seizure, the court held that respondents had "automatic standing" under *Jones* and affirmed the district court's suppression order (Pet. App. 10a).

## SUMMARY OF ARGUMENT

As the Court has repeatedly emphasized, the Fourth Amendment protects individuals from unreasonable governmental invasions of their legitimate expectations of privacy. In the absence of such a privacy interest, no right within the purview of the Fourth Amendment arises. In particular, "[a] person who is

aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas* v. *Illinois*, 439 U.S. 128, 134 (1978). In the instant case, the court of appeals correctly concluded that no Fourth Amendment right of respondents was implicated by the unlawful search of the apartment rented by Zackular's mother.

Absent a violation of their own rights under the Fourth Amendment, respondents cannot seek to suppress evidence seized during this unlawful search. "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Rakas* v. *Illinois*, *supra*, 439 U.S. at 133-134, quoting *Alderman* v. *United States*, 394 U.S. 165, 174 (1969). Since neither respondent had an "interest in connection with the searched premises that gave rise to 'a reasonable expectation [on his part] of freedom from governmental intrusion' upon those premises," *Combs* v. *United States*, 408 U.S. 224, 227 (1972) (brackets in original), quoting *Mancusi* v. *DeForte*, 392 U.S. 364, 368 (1968), they are not entitled to challenge the search and obtain suppression of the seized evidence unless, as the court of appeals held, the "automatic standing" rule permits them to do so.

In *Jones* v. *United States*, 362 U.S. 257 (1960), the Court held that a defendant automatically has "standing" under the Fourth Amendment to contest a search and seizure where he is "charged with an



offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *Brown* v. *United States*, 411 U.S. 223, 229 (1973). In effect, the "automatic standing" rule enables a defendant whose Fourth Amendment rights were not infringed to challenge the legality of the search and seek suppression of the evidence seized on the ground that the search and seizure violated the constitutional rights of someone else.

The Court in *Jones* concluded that a "special problem" (362 U.S. at 261) arises in cases where "[p]ossession [is] the basis of the Government's case against [the defendant]" (362 U.S. at 258) that, for two reasons, warranted departure from the usual principles of the Fourth Amendment. First, the Court found that the customary "standing" requirements subjected defendants charged with possessory offenses to the "dilemma" (362 U.S. at 263) either to forego their Fourth Amendment challenge or to give incriminating testimony against themselves. Second, the Court expressed concern that to apply the "standing" doctrine in such cases would allow the government to take inconsistent positions in the prosecution and thus derogate from the proper administration of the criminal law.

The "automatic standing" rule of *Jones* represents a departure from fundamental Fourth Amendment principles. In our view, the time has come, in light of subsequent developments and further critical analysis, to abolish the "automatic standing" rule.

The first concern underlying the rule—the "dilemma" that, in order to establish his actual "standing," a defendant charged with a possessory offense might have to give testimony at a suppression hearing that the prosecution could use at trial to prove his guilt—has been eliminated by this Court's later decision in *Simmons* v. *United States*, 390 U.S. 377 (1968), which held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection" (*id.* at 394). In light of *Simmons*, "[t]he self-incrimination dilemma, so central to the *Jones* decision, can no longer occur under the prevailing interpretation of the Constitution." *Brown* v. *United States*, *supra*, 411 U.S. at 228.

Nor can the "automatic standing" rule be justified by the asserted "vice of prosecutorial self-contradiction" whereby "the Government * * * allege[s] possession as part of the crime charged, and yet den[ies] that there was possession sufficient for standing purposes" (*Brown* v. *United States*, *supra*, 411 U.S. at 229). The Fourth Amendment proscribes unreasonable governmental intrusions upon individuals' legitimate expectations of privacy. The provisions of the penal code defining possessory offenses, on the other hand, are premised on different considerations and are directed at different ends from the privacy protections of the Fourth Amendment. *Jones* failed to recognize that the concept of "possession" can have different



meanings in the context of the Fourth Amendment, where it helps to illuminate the existence of a legitimate expectation of privacy, and in the context of the criminal law, where it serves to demarcate antisocial conduct and culpable behavior. This relationship between the criminal law and the Fourth Amendment is well illustrated by the concept of constructive possession, which the criminal law rightly condemns as illegal activity, but which does not give rise to a reasonable expectation of privacy that is infringed by an unlawful search of a third party. Thus, there is nothing "contradictory" in "subject[ing] the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one [whose privacy interests have been breached by an unreasonable search and seizure]" (362 U.S. at 263).

## ARGUMENT

### SINCE THEIR FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED, RESPONDENTS CANNOT SEEK TO SUPPRESS EVIDENCE SEIZED DURING THE UNLAWFUL SEARCH OF A THIRD PARTY'S APARTMENT

#### A. No Fourth Amendment Right Of Respondents Was Violated By the Unlawful Search Of A Third Party's Apartment

As the Court has repeatedly emphasized, "the Fourth Amendment * * * protects people from unreasonable government intrusions into their legitimate expectations of privacy." *United States* v. *Chadwick*, 433 U.S. 1, 7 (1977). See also, *e.g.*, *id.*

at 11; *Rakas* v. *Illinois*, 439 U.S. 128, 143 & n.12 (1978); *United States* v. *Miller*, 425 U.S. 435, 440 (1976); *Combs* v. *United States*, 408 U.S. 224, 227 (1972); *Alderman* v. *United States*, 394 U.S. 165, 179 n.11 (1969); *Mancusi* v. *DeForte*, 392 U.S. 364, 368 (1968); *Katz* v. *United States*, 389 U.S. 347 (1967); *Warden* v. *Hayden*, 387 U.S. 294, 304 (1967). Absent a legitimate expectation of privacy, no interest cognizable by the Fourth Amendment is implicated by a governmental search or seizure. In particular, "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. *Alderman*, *supra*, at 174." *Rakas* v. *Illinois*, *supra*, 439 U.S. at 134. See also *Alderman* v. *United States*, *supra*, 394 U.S. at 171-172.

In the instant case, no Fourth Amendment rights of respondents were affected by the unlawful search of the apartment rented by Zackular's mother. The government's motion for reconsideration in the district court contended that respondents "did not have sufficient proprietary or possessory interest in the property seized or premises searched to contest the admissibility of evidence in this case" (App. 21), and neither respondent replied by asserting that he had a legitimate privacy interest of any sort in the searched apartment. Indeed, respondent Zackular expressly acknowledged in his brief to the court of appeals that "he was not on the premises at the time of the contested search and * * * did not testify at



the hearing on the motion to suppress that he had a proprietary interest in the searched premises" (Br. at 13, No. 78-1529 (1st Cir.)). Rather than claiming any legitimate expectation of privacy, respondents have relied solely on their "automatic standing" to contest the legality of the search. In these circumstances, the court of appeals correctly concluded (Pet. App. 8a-9a) that "neither [respondent] has actual standing to contest the lawfulness of the search and seizures. Neither [respondent] has established a reasonable expectation of privacy in the premises searched or the property seized, nor has either of them ever claimed a proprietary or possessory interest in the premises or the checks." [4]

**B. Absent A Violation Of Their Own Fourth Amendment Rights, Respondents Cannot Seek To Suppress Evidence Seized During An Unlawful Search**

***1. Respondents Cannot Assert The Fourth Amendment Rights Of Other Persons***

It is well settled that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Rakas*

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[4] Since respondents had an adequate opportunity but failed to raise any privacy interest that would entitle them to challenge the search, the appropriate disposition of the case, in the event the Court agrees with our contention that the "automatic standing" rule should be abolished, would be to deny respondents' motions to suppress rather than to remand for further factual proceedings on the suppression issue. Compare *Rakas* v. *Illinois*, *supra*, 439 U.S. at 130-131 n.1, with *Combs* v. *United States*, *supra*, 408 U.S. at 227-228. See also *Brown* v. *United States*, 411 U.S. 223, 230 (1973).

v. *Illinois, supra,* 439 U.S. at 133-134, quoting *Alderman* v. *United States, supra,* 394 U.S. at 174.[5] With the exception of the "automatic standing" rule, this Court has never recognized "an independent constitutional right of [defendants] to exclude relevant and probative evidence because it was seized from another in violation of the Fourth Amendment." *Alderman* v. *United States, supra,* 394 U.S. at 174. See also, *e.g., id.* at 171-172; *Rakas* v. *Illinois, supra,* 439 U.S. at 133-138; *Zurcher* v. *Stanford Daily,* 436 U.S. 547, 562 n.9 (1978); *United States* v. *Miller, supra,* 425 U.S. at 444-445; *Brown* v. *United States, supra,* 411 U.S. at 230. Rather, "standing" to invoke the exclusionary rule depends on whether the defendant "had an interest in connection with the searched premises that gave rise to 'a reasonable expectation [on his part] of freedom from governmental intrusion' upon those premises." *Combs* v. *United States, supra,* 408 U.S. at 227 (brackets in original), quoting *Mancusi* v. *DeForte, supra,* 392 U.S. at 368.

[5] The Court in *Rakas* abandoned the concept of "standing" under the Fourth Amendment, stating that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing" (439 U.S. at 139). In this analysis the relevant "question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect" (439 U.S. at 140).



Since, as discussed above, none of their Fourth Amendment rights was violated, respondents cannot seek to suppress the evidence seized during the unlawful search unless, as the court of appeals held, the "automatic standing" rule permits them to do so.[6]

### 2. *The "Automatic Standing" Rule Of* Jones v. United States *Should Be Overruled*

a. In *Jones* v. *United States,* 362 U.S. 257 (1960), the Court held that a defendant automatically has "standing" under the Fourth Amendment to move to exclude from evidence an item that was seized during an assertedly illegal search where possession of the item by the defendant at the time of the search constitutes an essential element of the offense charged.[7] As the Court has most recently explained it, the "automatic standing" rule is applicable where the defendant is "charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *Brown* v. *United States, supra,* 411 U.S. at 229. See also *Simmons* v. *United States,* 390 U.S. 377, 390 (1968).

[6] By the same token, since their Fourth Amendment rights were not violated, respondents cannot invoke any of the remedies, such as a damage action, provided for victims of unconstitutional searches and seizures. Compare *Rakas* v. *Illinois, supra,* 439 U.S. at 134; *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

[7] The defendant in *Jones* was also held to have standing (362 U.S. at 265-267) because of his legitimate expectation of privacy in the premises that were searched. See *Rakas* v. *Illinois, supra,* 439 U.S. at 141, 143.

In *Jones*, the defendant was charged with various possessory narcotics offenses. Under the pertinent statutes, the defendant could have been convicted "through proof solely of possession of narcotics" (362 U.S. at 261). Thus, "[p]ossession was the basis of the Government's case against [the defendant]" (362 U.S. at 258).

The Court in *Jones* recognized the established requirements that to have "standing" a defendant "must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. * * * Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy" (362 U.S. at 261).[8] However, it concluded that cases

[8] The Court also stated (362 U.S. at 261):

> [Fed. R. Crim. P.] 41(e) applies the general principle that a party will not be heard to claim a constitutional protection unless he "belongs to the class for whose sake the constitutional protection is given." *Hatch* v. *Reardon*, 204 U.S. 152, 160. The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy.



"like this one have presented a special problem" (362 U.S. at 261) that, for two reasons, warranted departure from the usual principles of Fourth Amendment "standing."

First, the Court found that the customary "standing" requirements subjected defendants charged with possessory offenses to the "dilemma" (362 U.S. at 263) either to forego their Fourth Amendment challenge or to give incriminating testimony against themselves:

> To establish "standing," Courts of Appeals have generally required that the movant claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched. Since narcotics charges like those in the present indictment may be established through proof solely of possession of narcotics, a defendant seeking to comply with what has been the conventional standing requirement has been forced to allege facts the proof of which would tend, if indeed not be sufficient, to convict him. At the least, such a defendant has been placed in the criminally tendentious position of explaining his possession of the premises. He has been faced, not only with the chance that the allegations made on the motion to suppress may be used against him at the trial, although that they may is by no means an inevitable holding, but also with the encouragement that he perjure himself if he seeks to establish "standing" while maintaining a defense to the charge of possession. [362 U.S. at 261-262.]

Second, the Court expressed concern that to apply the "standing" doctrine in cases like *Jones* would allow the government to take inconsistent positions in the prosecution and thus would derogate from the proper administration of the criminal law:

> [T]o hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government. [362 U.S. at 263-264.]

Thus, the doctrine of "automatic standing" was originally devised to serve the interrelated aims of (1) relieving a defendant from the dilemma in which, in order to assert his Fourth Amendment suppression claim, he would have to give testimony that the government could directly use against him at trial to prove his guilt, and (2) avoiding the "vice of prosecutorial self-contradiction" (*Brown* v. *United States*,



*supra*, 411 U.S. at 229) in the government's denying that the defendant had a possessory interest for purposes of the Fourth Amendment suppression claim while at the same time alleging defendant's possession as part of the offense charged.[9]

As discussed above (pages 11-13, *supra*) and as recognized in *Jones* itself (362 U.S. at 261, 263), the "automatic standing" rule constitutes a departure from fundamental Fourth Amendment precepts, for it "may allow a defendant to assert the Fourth Amendment rights of another" (*Rakas* v. *Illinois*, *supra*, 439 U.S. at 135 n.4). In our view, the time has come, in light of subsequent developments and further critical analysis, to abolish the "automatic standing" rule of *Jones*.[10]

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[9] Thus, "automatic standing" was directed not to the privacy interests embodied in the Fourth Amendment but rather to a problem of self-incrimination and the perceived impropriety of the government's position in criminal cases.

[10] The Court noted in *Rakas* that it has "not yet had occasion to decide whether the automatic-standing rule of *Jones* survives [the] decision in *Simmons* v. *United States*, 390 U.S. 377 (1968)" (439 U.S. at 135 n.4). See also *Rakas* v. *Illinois*, *supra*, 439 U.S. at 160 n.6 (White, J., dissenting); *Brown* v. *United States*, *supra*, 411 U.S. at 228-229; *Combs* v. *United States*, *supra*, 408 U.S. at 227 n.4.

The courts of appeals are divided on the continued applicability of the "automatic standing" rule. The Sixth Circuit has abandoned the rule in light of *Simmons* v. *United States*, *supra*. See *United States* v. *Killebrew*, 594 F.2d 1103 (6th Cir. 1979); *United States* v. *Grunsfeld*, 558 F.2d 1231, 1241-1242 (6th Cir.), cert. denied, 434 U.S. 872 (1977), 1016 (1978); *United States* v. *Hunter*, 550 F.2d 1066, 1072-1075 (6th Cir. 1977); *United States* v. *Delguyd*, 542 F.2d 346, 350 (6th Cir.

b. The first concern underlying the *Jones* "automatic standing" rule—the "dilemma" that, in order to establish his actual "standing," a defendant

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1976); *United States* v. *Dye*, 508 F.2d 1226, 1232-1234 (6th Cir. 1974), cert. denied, 420 U.S. 947 (1975). The Tenth Circuit has suggested that it reads *Simmons* and *Brown* to repudiate the "automatic standing" rule. See *United States* v. *Smith*, 495 F.2d 668, 670 (10th Cir. 1974). The Fifth Circuit has expressed "serious doubts concerning the viability of the 'automatic standing' rule in light of *Simmons* v. *United States*" (*United States* v. *Edwards*, 577 F.2d 883, 892 (5th Cir.) (en banc), cert. denied, 439 U.S. 968 (1978)); see also 577 F.2d at 896 (five judges concluding that the "automatic standing" rule should be eliminated); *United States* v. *Archbold-Newball*, 554 F.2d 665, 679 (5th Cir.), cert. denied, 434 U.S. 1000 (1977). Nonetheless, it has continued to apply the rule. See, *e.g.*, *United States* v. *Reyes*, 595 F.2d 275, 279 (5th Cir. 1979); *United States* v. *Ullrich*, 580 F.2d 765, 768 (5th Cir. 1978). The Second Circuit, while expressing "misgivings about the continued survival of the concept of automatic standing" (*United States* v. *Oates*, 560 F.2d 45, 52 (2d Cir. 1977)), has stated "that overruling *Jones* is properly a matter for the Supreme Court" (*United States* v. *Galante*, 547 F.2d 733, 737 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977)); see also *United States* v. *Penco*, No. 78-1182 (2d Cir. Sept. 6, 1979), slip op. 4511; *United States* v. *Ochs*, 595 F.2d 1247, 1253 n.4 (2d Cir.), cert. denied, No. 79-203 (Nov. 13, 1979); *United States* v. *Riquelmy*, 572 F.2d 947, 950-951 (2d Cir. 1978); *United States* v. *Oates*, *supra*; *United States* v. *Banerman*, 552 F.2d 61, 63 (2d Cir. 1977). The Eighth Circuit has also declared that it will adhere to the "automatic standing" rule in the absence of a clear mandate from this Court. See *United States* v. *Anderson*, 552 F.2d 1296, 1299 (8th Cir. 1977); see also *United States* v. *Kelly*, 529 F.2d 1365, 1370-1371 (8th Cir. 1976); but see *United States* v. *Barber*, 557 F.2d 628, 633-634 (8th Cir. 1977). In addition, the Ninth Circuit continues to follow the doctrine of "automatic standing." See *United States* v. *Powell*, 587 F.2d 443, 446 (9th Cir. 1978); *United States* v. *Abascal*, 564 F.2d 821, 829



charged with a possessory offense might have to give testimony at a suppression hearing that the prosecution could use at trial to prove his guilt—has been eliminated by this Court's later decision in *Simmons* v. *United States*, 390 U.S. 377 (1968). *Simmons* was a prosecution for bank robbery in which FBI agents searched the house of defendant Andrews' mother and uncovered two suitcases in the basement; one of the suitcases was found to contain a gun holster, a sack similar to the one used in the bank robbery, and several coin cards and bill wrappers from the bank that had been robbed (390 U.S. at 380). In order to establish his "standing" to challenge this search and the introduction into evidence of the items seized, defendant Garrett testified at the suppression hearing that the suitcase was similar to one he owned and that he was the owner of the clothing discovered in the suitcase (390 U.S. at 381). Garrett's motion to suppress was denied, and his testimony at the suppression hearing was admitted into evidence against

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(9th Cir. 1977), cert. denied, 435 U.S. 942, 953 (1978); *United States* v. *Haddad*, 558 F.2d 968, 974-975 (9th Cir. 1977); *United States* v. *Jamerson*, 549 F.2d 1263, 1267-1269 (9th Cir. 1977); *United States* v. *Boston*, 510 F.2d 35 (9th Cir. 1974), cert. denied, 421 U.S. 990 (1975). The Fourth and Seventh Circuits also appear to recognize the possibility of "automatic standing." See *United States* v. *Lang*, 527 F.2d 1264, 1266 (4th Cir. 1975), cert. denied, 424 U.S. 920 (1976); *United States* v. *Alewelt*, 532 F.2d 1165, 1167 (7th Cir.), cert. denied, 429 U.S. 840 (1976). And in the instant case the First Circuit held (Pet. App. 9a-10a) that despite *Simmons*, *Brown* and *Rakas*, it would abide by the "automatic standing" rule until the Court passes on the issue.

him as part of the government's case-in-chief at trial.[11]

On review of Garrett's conviction, this Court reversed. It found that "a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim" (390 U.S. at 392-393). It also noted that, although as an "abstract matter" the testimony at the suppression hearing was voluntary (390 U.S. at 393), Garrett "was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another" (390 U.S. at 394).[12] Accordingly, the Court held that

[11] In the absence of use immunity of the sort recognized in *Simmons*, a defendant's suppression testimony could, as an admission, be introduced as substantive evidence against him in the prosecution's case-in-chief.

[12] The *Simmons* self-incrimination analysis has subsequently been questioned by the Court. In *McGautha* v. *California*, 402 U.S. 183 (1971), the Court, in re-examining the rationale of *Simmons*, explained that "the purely Fifth Amendment interests involved in *Simmons*" were "insubstantial[]" (402 U.S. at 212) and that, "to the extent that * * * [*Simmons*] was based on a 'tension' between constitutional rights and the policies behind them, the validity of that reasoning must now be regarded as open to question" (*ibid.*). Cf. *United States* v. *Kahan*, 415 U.S. 239 (1974); but see *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 807-808 (1977). However, the Court in *McGautha* had "no occasion to question the soundness of the



"when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection" (*ibid.*).

In light of *Simmons*, the Court's first concern in *Jones* has been resolved.[13] "The self-incrimination dilemma, so central to the *Jones* decision, can no longer occur under the prevailing interpretation of the Constitution [in *Simmons*]." *Brown* v. *United States*, *supra*, 411 U.S. at 228.[14] Thus, the continued

result in *Simmons* and [did] not do so" (402 U.S. at 212), for it found that *Simmons* was based on adequate Fourth Amendment grounds (402 U.S. at 211):

> In *Simmons* we held it unconstitutional for the Federal Government to use at trial the defendant's testimony given on an unsuccessful motion to suppress evidence allegedly seized in violation of the Fourth Amendment. We concluded that to permit such use created an unacceptable risk of deterring the prosecution of marginal Fourth Amendment claims, thus weakening the efficacy of the exclusionary rule as a sanction for unlawful police behavior. This was surely an analytically sufficient basis for decision.

[13] Indeed, because *Simmons* applies to all cases (390 U.S. at 390-392), while *Jones* extends only to "offense[s] that include[], as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure" (*Brown* v. *United States*, *supra*, 411 U.S. at 229), the protection recognized in *Simmons* is broader than that afforded by *Jones*.

[14] One commentator has suggested that, to the extent *Simmons* permits a defendant's testimony on his suppression motion to be used to impeach his testimony at trial, the "automatic standing" rule should be retained. 3 W. LaFave,

validity of the "automatic standing" rule rests solely on the asserted "vice of allowing the Government to allege possession as part of the crime charged, and

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*Search and Seizure: A Treatise on the Fourth Amendment* § 11.3, at 588-589 (1978).

While the delineation of *Simmons* is not presented in this case except insofar as it might bear on the "automatic standing" issue, we note our view that *Simmons* does not prohibit the prosecution from using the defendant's prior testimony for impeachment purposes at trial. *Simmons* renders the defendant's suppression testimony inadmissible "against him at trial on the issue of guilt" (390 U.S. at 394). "[W]hether he succeeds or fails to suppress the evidence, his testimony on that score is not *directly* admissible against him in the trial." *Brown* v. *United States, supra,* 411 U.S. at 228 (emphasis added). As the Court recognized in *United States* v. *Kahan,* 415 U.S. 239, 243 (1974), in holding that a defendant's false statement at arraignment that he was without funds to retain a lawyer could be used against him at trial to prove the requisite state of mind for improperly receiving a gratuity and perjury, "[t]he protective shield of *Simmons* is not to be converted into a license for false representations on the issue of indigency free from the risk that the claimant will be held accountable for his falsehood." See also *Oregon* v. *Hass,* 420 U.S. 714 (1975); *Harris* v. *New York,* 401 U.S. 222 (1971); *Walder* v. *United States,* 347 U.S. 62 (1954).

However, it does not follow, as Professor LaFave suggests, that to allow a defendant's suppression hearing testimony to be used for impeachment at trial would present the type of self-incrimination "dilemma" that concerned the Court in *Jones.* The prospect that earlier testimony might be used at trial solely for impeachment purposes is legitimate cause for apprehension only if the defendant intends to "use perjury by way of a defense" (*Harris* v. *New York, supra,* 401 U.S. at 226). His "dilemma," then, is not, as in *Jones,* that if he tells the truth at the suppression hearing, he virtually confesses his guilt of the possessory offense. It is, rather, that if he speaks truthfully on one occasion, he impairs his ability to make contradictory statements on the other. But any time



yet deny that there was possession sufficient for standing purposes" (*id.* at 229).

c. In our view, the "automatic standing" rule—a rule that authorizes a defendant whose Fourth Amendment rights have not been violated to seek suppression of reliable and probative evidence—cannot be justified by "this vice of prosecutorial self-contradiction" (*Brown* v. *United States, supra,* 411 U.S. at 229). Indeed, we submit that no such "vice" arises in situations governed by the "automatic standing" rule.

The Court in *Jones* was concerned that to permit the prosecution to contest the "standing" of a defendant charged with a possessory offense would be to "subject[] the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of

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a person testifies under oath he is "under an obligation to speak truthfully and accurately" (*Harris* v. *New York, supra,* 401 U.S. at 225). Accordingly, it would seem particularly inappropriate to relax the requirements for "standing" to suppress simply to "free [the defendant] from the risk of confrontation with prior inconsistent utterances" (*id.* at 226). Such action is simply not necessary to satisfy the purpose of *Simmons* to afford the defendant an adequate opportunity to assert his Fourth Amendment claims. See note 12, *supra.*

To the extent that "such use [for impeachment] create[s] an unacceptable risk of deterring the prosecution of marginal Fourth Amendment claims, thus weakening the efficacy of the exclusionary rule as a sanction for unlawful police behavior" (*McGautha* v. *California, supra,* 402 U.S. at 211), the appropriate course would be to extend the scope of *Simmons,* not to perpetuate the "automatic standing" rule.

the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government" (362 U.S. at 263-264). This analysis, however, rests on a fundamental confusion concerning distinct elements in the criminal law and the Fourth Amendment.

As discussed above (pages 9-10, *supra*), the Fourth Amendment proscribes unreasonable governmental intrusions upon individuals' legitimate expectations of privacy. To invoke this constitutional protection, therefore, a person must assert a violation of his own legitimate privacy interest (see pages 11-12, *supra*). In the language of *Jones* (362 U.S. at 263), "the remedies designed for one" whose Fourth Amendment rights have been infringed derive from this fundamental principle of privacy.

It is not in any way inconsistent with this principle for the government to charge a defendant with a possessory offense defined in the criminal law and, at the same time, to contend that no legitimate privacy expectation of the defendant's under the Fourth Amendment was implicated in the search and seizure that uncovered the items illegally possessed. The provisions of the penal code regarding possessory offenses are premised on different considerations and are directed at different ends from the privacy protections of the Fourth Amendment. *Jones* failed to recognize that the concept of "possession" can have different meanings in the context of the criminal law, where it serves to demarcate antisocial conduct and culpable behavior, and in the context of the Fourth



Amendment, where, as the Court explained in *Rakas* (439 U.S. at 143-144 n.12), it helps to illuminate the existence of a legitimate expectation of privacy. See *United States* v. *Hunter*, 550 F.2d 1066, 1074 (6th Cir. 1977).[15] Thus, there is nothing "contradictory" in "subject[ing] the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one [whose privacy interests have been breached by an unreasonable search and seizure]" (362 U.S. at 263).

This relationship between the criminal law and the Fourth Amendment can best be illustrated by the well-recognized concept of constructive possession.[16]

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[15] "By employing the term 'possession' in *Jones* to define both what the law bans as criminal and the scope of the fourth amendment's protection, Justice Frankfurter fell prey to the 'tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them * * *. [This tendency] has all the tenacity of original sin and must constantly be guarded against.'" Trager and Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 41 Brooklyn L. Rev. 421, 437-438 (1975), quoting Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 Yale L.J. 333, 337 (1933).

[16] "[C]onstructive possession means being in a position to exercise dominion or control over a thing." *United States* v. *Holland*, 445 F.2d 701, 703 (D.C. Cir. 1971) (footnote omitted). Constructive possession has been "defined as such a 'nexus or relationship between the defendant and the goods that it is reasonable to treat the extent of the defendant's dominion and control as if it were actual possession.'" *United States* v. *Carneglia*, 468 F.2d 1084, 1087 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973), quoting *United States* v. *Casalinuovo*, 350 F.2d 207, 209 (2d Cir. 1965). See also, *e.g.*, *United*

A defendant who exercises dominion and control over a proscribed item, even though he does not physically possess it, has engaged in conduct that the penal code rightly condemns. At the same time, however, if the police search the premises of a third person and discover that item, the defendant has not suffered, by virtue of his wrongful constructive possession, any intrusion upon his privacy interest.

> [O]ne may be in lawless—albeit constructive—possession for purposes of the criminal law, but have no possession for purposes of the fourth amendment. * * * [T]here is nothing inconsistent in saying that a defendant possesses or once possessed contraband in a way that brings him within the penal law but did not or does not now possess the contraband in a manner that is relevant to the purposes of the fourth amendment.
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> * * * * *
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> The concept of "possessory interest" is then properly recognized as contextual. It is evident, therefore, that there was no contradiction present when the Government denied in *Jones* that the defendant had possession of narcotics for fourth amendment purposes while at the same time seeking to prove possession within the meaning of the penal law.

Trager and Lobenfeld, *The Law of Standing Under the Fourth Amendment*, 41 Brooklyn L. Rev. 421, 437, 444 (1975). See also *United States* v. *Hunter*, *supra*, 550 F.2d at 1074; Gutterman, "*A Person*

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*States* v. *Staten*, 581 F.2d 878, 883 & n.45 (D.C. Cir. 1978); *United States* v. *DiNovo*, 523 F.2d 197, 201 (7th Cir.), cert. denied, 423 U.S. 1016 (1975).



*Aggrieved*": *Standing to Suppress Illegally Seized Evidence in Transition*, 23 Emory L.J. 111, 125-127 (1974).[17]

The absence of any inherent contradiction is clearly shown by the facts of the present case. It may be assumed, as the government will seek to prove at trial, that respondents, having come into unlawful possession of stolen mail, determined that it would be desirable to keep it at the apartment of Zackular's mother until such time as they chose to reclaim it. Their sole interest in that apartment, however, was as a repository for their contraband. In such circumstances, the law properly recognizes their culpable

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[17] For example, in *County Court of Ulster County, New York* v. *Allen*, No. 77-1554 (June 4, 1979), defendants were convicted of illegally possessing firearms. The convictions were based on each defendant's constructive possession of the firearms (slip op. 23), which were discovered in a car in which the defendants were riding. However, to the extent they had no legitimate expectation of privacy in the areas of the automobile that were searched (slip op. 2-3), the defendants did not, under *Rakas* v. *Illinois*, *supra*, have any Fourth Amendment interest that would have entitled them to challenge the legality of the search or to seek exclusion of the evidence seized. In these circumstances, it would not be "contradictory" for the government both to prosecute on the possessory offense and to contend that the defendants should not be heard to contest the legality of the search.

In addition to constructive possession, other instances exist where a defendant is charged with a possessory offense but has no legitimate privacy interest under the Fourth Amendment. Thus, a defendant who aids and abets another's unlawful possession is deemed to have committed that possessory offense as a principal, yet he would have no Fourth Amendment interest in the search of his confederate's premises that uncovered the illegally possessed item. See *United States* v. *Oates*, 560 F.2d 45, 53-56 (2d Cir. 1977).

possession of the stolen mail at the time of its seizure, despite the fact that they have not the slightest basis for claiming any invasion of their personal privacy interests from the search. In no sense can the government fairly be charged with self-contradiction in this situation.

Thus, to charge a defendant with a possessory offense, but to urge that he cannot invoke the Fourth Amendment and the exclusionary rule unless he demonstrates a personal interest reflecting a legitimate expectation of privacy, is not tantamount to "squarely contradictory assertions of power by the Government" (*Jones* v. *United States, supra,* 362 U.S. at 264).[18]

[18] In our view, the "automatic standing" rule also suffers from two additional analytical defects: first, it treats a possessory interest in the items *seized* as sufficient to permit a Fourth Amendment challenge to the underlying *search,* and, second, it assumes that a defendant can have a legitimate Fourth Amendment interest in contraband, which by definition can only be illegally possessed. We submit that such propositions are unsound, not only for purposes of the "automatic standing" rule, but also as a matter of general Fourth Amendment doctrine. These questions are presented in the government's pending petition for a writ of certiorari in *United States* v. *Conway,* No. 79-393 (filed Sept. 7, 1979), a copy of which has previously been provided to counsel for respondents here. It also appears that these issues are raised in *Rawlings* v. *Kentucky,* cert. granted, No. 79-5146 (Dec. 10, 1979), which is to be argued in tandem with the instant case. It is unnecessary for the Court to reach these more general issues in order to overturn the "automatic standing" rule.

Moreover, apart from its analytical deficiencies, the rationale of "prosecutorial self-contradiction" offered to support the "automatic standing" rule is simply inadequate to justify the heavy societal costs that result from the exclusion of reliable and probative evidence at trial.



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

ANDREW L. FREY
*Deputy Solicitor General*

MARK I. LEVY
*Assistant to the Solicitor General*

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